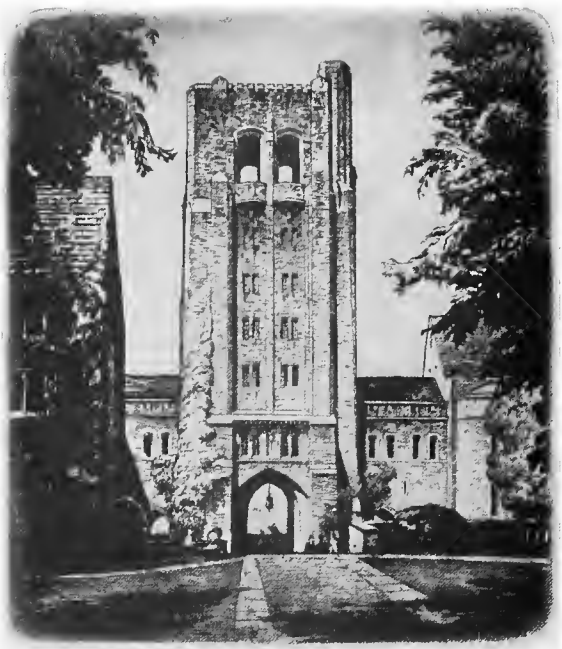
EXPRESS TRUSTS. CORPORATIONS. "VOLUNTARY ASSOCIATIONS."



EXPRESS TRUSTS

UNDER THE COMMON LAW

A Superior and Distinct Mode of Administration

Distinguished from Partnerships

Contrasted with Corporations

Two papers submitted to the Tax Commissioner of Massachusetts, under Chapter 55 of the Resolves of 1911, requiring a report from him on "VOLUNTARY ASSOCIATIONS"

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By chapter 55, Resolves of 1911, the Tax Commissioner of Massachusetts was directed to make an investigation of *Voluntary Associations* organized or doing business in that Commonwealth under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares, with a view to determining the present legal status of such Voluntary Associations and whether or not their *prohibition* or *further control and regulation* by that Commonwealth is advisable and in the public interest. The resolve is as follows: —

CHAPTER 55.

RESOLVE TO PROVIDE FOR AN INVESTIGATION OF *VOLUNTARY ASSOCIATIONS* ORGANIZED OR DOING BUSINESS IN THIS COMMONWEALTH UNDER WRITTEN INSTRUMENTS OR DECLARATIONS OF TRUST.

RESOLVED, That the tax commissioner is hereby authorized and directed to make an investigation of *voluntary associations* organized or doing business in this Commonwealth under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares, with a view to determining the present legal status of such voluntary associations, and whether or not their *prohibition or further control and regulation* by the Commonwealth is advisable and in the public interest. The attorney-general is hereby directed to give the tax commissioner such assistance as the latter may desire in making this investigation, and said commissioner may if he deems it advisable hold public hearings, after due notice, and shall consult with the board of railroad commissioners and the board of gas and electric light commissioners with especial reference to the effect of such voluntary associations upon the supervision and regulation of gas, electric light and street railway companies in this Commonwealth. The tax commissioner shall report the result of his investigation to the general court on or before the second Saturday of January, nineteen hundred and twelve, with such recommendations as he may deem advisable: and he shall submit, with his report, drafts of any bill or bills necessary to carry into effect any recommendation which he may make. In conducting the above investigation, the tax commissioner may employ such assistance and incur such reasonable expenses, not exceeding twenty-five hundred dollars, as may be approved by the governor and council; and said commissioner shall have power to require the attendance and testimony of witnesses and the production of all books and documents relating to any matter within the scope of the said investigation. Witnesses shall be summoned in the same manner and be paid the same fees as are witnesses in the municipal court of the city of Boston. (Approved April 15, 1911.)

CITATIONS.

Express Trusts. Corporations. "Voluntary Associations."

First Paper, November 20, 1911.

The Hon. Woodrow Wilson, in his cogent address entitled "The Lawyer and the Community," before the American Bar Association, at Chattanooga, Tenn., August 31, 1910, transmitted later in pamphlet form, challenged the profession in demanding that the *impersonal* feature of corporations should be restricted as the one obstacle that has blocked progress toward effective corporation reform. This question, he says: —

"Stands in the foreground of all modern economic questions so far as the United States is concerned." . . . "Liberty is always *personal*, never aggregate; always a thing inhering in individuals taken singly, never in groups or corporations or communities. The individual unit of society is the individual." . . . "That is why I plead so earnestly for the individualization of responsibility within the corporation, for the establishment of the principle of law that a man has no more right to do a wrong as a member of a corporation than as an individual."

Mr. Wilson was promptly advised from Boston that his call upon the profession had been anticipated in Massachusetts by numerous Express Trusts declared in that state, and which exercise the common-law natural right to employ all the mere incidents or accessaries used in the management or mobility of property, such as transferable shares, bond issues, promissory notes etc., but which do not and need not arrogate any *essential* of a corporation, such as merging natural persons into an impersonal, artificial entity, or suing or being sued under their designated name, and which (with proper provision for reimbursement) place upon Trustees a personal responsibility that corporate laws

are especially designed to evade, and which evasion, legalized by State Legislatures, both confirms the popularity and causes the condemnation of corporations.

Mr. Wilson was referred to, among others, the example furnished a century ago by Alexander Hamilton, who employed this trust method — in use long before his day — in organizing the Merchants Bank of New York; and he was further reminded that some corporation promoters might discourage this effective personal bulwark; and that States like Maine and New Jersey, that have coined money by marketing corporation charters created on the impersonal basis, might frown upon this sound, independent, common-law trust method of administration.

Mr. Wilson promptly expressed his sincere appreciation of the information that had called his attention "to a most interesting matter" which he wished "more carefully to look into after the distractions of the present campaign are over."

In guarding the State and the business world from the pitfalls of impersonal corporate bodies, both the Bar and the Bench should encourage the application to affairs of the elastic, effective, and well-grounded principles of common-law Express Trusts. Mr. Wilson, in his Chattanooga address, insisted that although

"Corporations must continue to be used as a convenience in the transaction of business, yet they must cease to be used as a covert to wrongdoers."

And he added: —

"It is the duty of lawyers, of all lawyers, to assist the makers of law and the reformers of abuses by pointing out the best and most effective way to make it."

Express Trusts, which now meet with augmented approval in Massachusetts, and the merits of which the country at large begins to appreciate, put the legal estate

entirely in one or more, while others have a beneficial interest in and out of the same, but are neither partners nor agents. This simple, adequate, common-law right, any person or group of persons *sui juris* may exercise, the Trustees issuing certificates of beneficial interest divided into shares, as well as issuing bonds and other obligations, as freely as they open a bank account, have a pass book, and draw and circulate checks, or make whatever contractual relations are allowed to persons as a natural right.

Express Trusts have been in successful operation in Great Britain and America for generations. They have been and are applied wisely in both hemispheres to property valued at hundreds of millions of dollars. To affirm at this date that considerations of public policy do not countenance Express Trusts that utilize conventional business accessaries is to challenge sound economics. Public policy is not always immutable. Neither lawyers nor laymen can ignore experience or the truth. It was Coleridge who wrote that "A man who squares his conscience by the law was a common paraphrase or synonyme of a wretch without any conscience at all." If public policy in this instance is to be measured — as it should be — by a standard of stability rather than of instability, the startling contrast presented later between Express Trusts and Massachusetts corporations ought to modify some notions of public policy. It is the substantiality of the trust principle, based upon personal responsibility and efficiency, that has so commended it over loose, evasive corporation laws found from the Atlantic to the Pacific.

Well-drawn modern Express Trusts avoid no legal obligation, much less do they *evade* any. If perverted they should of course be restrained. They avoid needless business obstacles; they require no arbitrary fixed capitalization; they can dispense with the deceptive fiction of a par value, a fiction that the New York State Bar Association is reported to have indorsed "as a tool of many rascals

and the honest servant of no man"; they promote sound administration; they stimulate mercantile intercourse; and they secure a higher standard of efficiency through active Trustees than is generally attained through the usual perfunctory, often irresponsible, dummy, corporate directors who fail to direct, and who when called to account in Court are admonished that the high criterion of a trusteeship should be their canon of conduct rather than that of a shifty directorate.

Trustees under Express Trusts pay taxes on their real and personal property. Trustees have to report fully to their beneficiaries, or be called to account in Court by them. Publicity, as with partnerships, is secured to all who are entitled to it. Public curiosity — mere prying, or prurient curiosity — is not gratified, and ought not to be. The Trustees are protected, as they should be, from personal loss, by a provision for exoneration or reimbursement from the estate, except in case of wilfull default or of fraud. The customary provision in the declaration of trust requiring all parties who deal with the Trustees to look to the estate for ultimate security, rather than to the Trustees or to the beneficiaries conforms with a common-law principle long sanctioned. Such a provision is a strong assurance of the merits of the Trust; because if its foundation does not permit of a substantial superstructure, as the basis of credit, the Trust is not likely to be declared or to induce desirable Trustees to accept it. Corporations on the other hand offer a premium, as it were, for a weak foundation based upon an irresponsible artificiality, and hence go to the wall by the thousands.

Express Trusts, under the common law, regulated by equitable principles and practice, furnish some of the highest models for administration. Corporations under State laws invite and are responsible for the greatest business scandals in our history. One who prefers to drink from a pure spring on a common cannot justly be charged

with *evading* a nearby licensed barroom. The latter may often be wisely avoided.

As for the equitable laws that regulate trusts and Trustees, they are a well-formed system which Mr. Justice Story pronounced as even more symmetrical in the United States than the original system in England.

Mr. Perry, one of America's leading authorities upon trusts, affirms that: —

"Every kind of valuable property, both real and personal, that can be assigned at law may be the subject-matter of a *trust*." And further: —

"The person who creates the *trust* may mould it into whatever form he pleases." (Perry on Trusts, I, §§67, 287; Underhill on Trusts, p. 57, Amer.Ed.)

The Federal Constitution protects Trustees as "citizens" throughout continental United States; but corporations, not being "citizens" as that word is used in the Constitution, do not have the privileges and immunities of citizens. Corporations cannot enter another State except on the terms which that State prescribes. But Trustees under a will, or under an express declaration of trust, are natural persons and are "citizens" in the fullest sense under the Constitution, and, as natural persons possessed of both state and national citizenship, are "entitled to all the privileges and immunities of the citizens in the several States."

Fed. Con., **Art. IV. Sec. 2.**
Farmers' Loan & Trust Co. v. *Chicago*, **etc., 27 Fed. Rep. 146, 149.**
Shirk v. *City of La Fayette*, **52 Fed. Rep. 857.**
Roby v. *Smith*, **131 Ind. 342, 345–6; 15 L. R. A. 792, 794–5.**
9 Federal Statutes Annot., **pp. 178–9.**

Mr. Justice Field of the Supreme Court of the U. S., in his opinion in the famous case of *Paul* v. *Virginia*, 8 Wallace, 168, 180, wrote:—

"It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this."

The purpose for which this clause was inserted in the Constitution

"was to prevent the States from making invidious discrimination against non-residents, and to promote the unification of the American people, by breaking down State lines, in respect to the enjoyment of social and business privileges and the favor and protection of the laws." (Black's Const. Law, p. 292.)

In most cases business men do not need a corporate charter, except for railroads, for the right of eminent domain, for banks, for insurance, and for certain public service functions. In most cases the State gives no adequate equivalent for its charter. It is often a useless incumbrance; and it often stimulates mercantile iniquity.

Our corporation laws throughout this country have become such a legalized means of *evasion* because of the impersonality, the artificial entity which they sanction, that they have elicited caustic criticism from executives, economists, educators, and business men.

In conservative Massachusetts over four thousand (4,154) of its State corporate charters, representing many millions of dollars of authorized capital stock, were dissolved by its Legislature in the last five years, an average of over two a day, omitting those otherwise dissolved. This shows that even Massachusetts' conservative corporation laws are a delusive will-o'-the-wisp to thousands of impressionable, misdirected people. This State incorporates about 1,200 or 1,300 companies a year, making for the past five years from about 6,000 to 6,500, and over 4,000—or about 64 per cent—were dissolved in that time. A very large number of Massachusetts corporations appear to be mere fugitive organizations, based upon credulity, and to be plucked in transit. This State cannot in justice demand the application of such an administrative system to every enterprise. It cannot properly insist upon a uniform, undiscriminating, and often inferior business method, whether for industrial or

taxation purposes, and then as an excuse say that it is not its function "to join in the futile attempt to save the foolish from the consequences of their folly." The State's corporation record in a large part on this score is self-incriminating. Here it is condensed, the list covering about ninety-four pages of the State laws: —

MASSACHUSETTS CORPORATIONS DISSOLVED IN THE LAST FIVE YEARS.

Acts of	Number dissolved
1907, ch. 290, pp. 226–250	1,164
1909, ch. 347, pp. 296–324	1,185
1910, ch. 609, pp. 662–684	932
1911, ch. 363, pp. 331–351	873
	4,154

Contrast the above excessive corporate mortality with the remarkable vitality of Express Trusts as furnished by the lists of real estate trusts in Boston, published by Burroughs & DeBlois,* the first of which appeared in 1899, and contained seventeen such trusts, every one of which are found today, with many more, on the monthly list which that firm publishes, and which list now represents investments of about one hundred and ten million dollars.

We do not know the whole number of real estate and of industrial common-law trusts, as well as partnerships, that make use of transferable shares, and are now operating in Massachusetts and elsewhere. But Express Trusts under testamentary and other written instruments affecting interests large and small, as well as partnerships, number many thousands.

Some States openly depend upon the liberality of their corporate charters to pay their expenses and to cancel their debts. Such a course is condemnatory. Sound finance repudiates it.

*Real Estate Trust Stocks, 30 Kilby Street, Boston.

Governor Fernald of Maine, in his address to the Legislature of that State in 1909, while suggesting reform in its corporate laws, stigmatized his State thus: —

"While it is true that the State is receiving large revenue from this source, it is also true that, in a considerable measure, *it is the price of prostitution.* I hope you will take steps to remodel them, along evident lines of reform, thus restoring to Maine her self-respect."

Severer strictures than this can be produced from recognized authorities in this country, as to the dishonor of corporate legislation, and as to the iniquities of impersonal and non-moral corporate-body acts that would expose individual trustees under Express Trusts to personal liability. While relatively the good wrought by corporations has been very great, yet absolutely the volume of mischief they are responsible for, and continue to invite, has been and is enormous.

Nowadays the right to organize a corporation is almost as free as the right to execute a deed of real estate; it has been carried to the utmost irresponsibility; and one may order and may receive, through the medium of charter purveyors, a number of corporate charters representing millions of capital, from any chosen State, almost with the celerity that one may order and receive as many boxes of cigars. Ordinary conveyancing, or constructive legal drafting, are utterly outmatched in such a performance.

The proper initial deliberation and after responsibility and attention that are respectively a condition precedent to the formation and conditions subsequent to the acceptance and performance of a meritorious Express Trust, proffer a wholesome corrective to the rash multiplication of the many anemic, moribund corporations that Massachusetts improvidently creates, feels bound to nurse for a while, and is then compelled to bury by the thousands. Our next State Commission might well be one on Corporation Eugenics.

Long before it was given, the decision of the Supreme Court of the United States last winter in *Eliot* v. *Freeman*, 220 U. S. Rep., p. 178, holding that Express Trusts in vogue in Massachusetts and elsewhere are as free as partnerships from the application of the Federal tax on doing business under a corporate charter, had been anticipated and acted upon accordingly in Massachusetts. That decision has a wider significance than may be realized in the transcontinental scope of its salutary application.

A few strong, permanent Express Trusts are worth more to this State and to the United States than the entire 4,000 chartered Massachusetts corporations cast by the wholesale into oblivion in the last five years by their own progenitor.

The Massachusetts Legislature passed a resolve (Resolves of 1911, Chap. 55) to provide that the Tax Commissioner shall make an "investigation of *Voluntary Associations* organized or doing business in this Commonwealth under a written instrument or declaration of trust, the beneficial interest under which is divided into transferable certificates of participation or shares, with a view to determining the present legal status of such Voluntary Associations, and whether or not their *prohibition* or *further control and regulation* by the Commonwealth is advisable and in the public interests." The Tax Commissioner was to report on this on or before January 13, 1912.*

If such an inquiry is aimed at one or two exceptional organizations affecting certain public service utilities, the public should be frankly informed thereof. But if its object is to put *every* personal Express Trust, and *every* partnership, that makes use of transferable shares, on a level with impersonal corporations, and *to prohibit*, or even to sub-

* His report is dated January 17, 1912, and found in House Document No. 1646.

ject *every* such Express Trust, and *every* such partnership, to an inquisitorial State control, though they are not created by the State, and are not all clothed with a public interest, then its purpose assumes a scope that requires extreme caution on the part of the Legislature.

Put in syllogistic form the prohibition aim of this inquiry involves the following fallacy: —

Some "voluntary associations" have been holding companies.

Some holding companies are said to have done harm.

Therefore public policy demands that hereafter *all* "voluntary associations" shall be prohibited.

The irrationality of the above will be more apparent if the syllogism is paraphrased thus: —

Some lawyers have been Presidents of the United States.

Some Presidents are said to have done harm.

Therefore public policy demands that hereafter *all* lawyers shall be prohibited.

This inquiry is directed to so-called "*Voluntary* Associations." Can anyone satisfactorily define, or explain the origin of, or justify the retention of that indefinite expression, "*Voluntary* Association"? Is its antithesis, an "*In*voluntary Association," ever used, either colloquially or technically? The difference between creation by sovereign power and creation by private contract is not a sufficient basis for the term. The creation in both cases rests upon volition. The sovereign does not force citizens to create; organization is optional under the general corporation laws. The term, however old, has no fixed application. It is not analogous to a voluntary settlement or conveyance which depends upon a meritorious or natural rather than a valuable consideration, upon blood or affection or

liberality than upon a compensatory or material advantage.

The definition of a "Voluntary Association" as given in the Century Dictionary is: —

"A society which is unincorporated, *but is not a partnership*, in that the members are not agents for one another."

The word "Voluntary" adds nothing definite to the word "Association." The word "Association" is understood to mean a body of persons united without a charter. "Associations" are sometimes partnerships, and oftentimes not partnerships. "The true test of partnership is the intention of the parties." (Parsons on Part. § 54.) Associations to produce something and divide the product are not partnerships. (*Id.* § 61): As to work a gold mine and divide the gold; to make and divide bricks; to fish and divide the fish caught; to manufacture and divide lumber. (*Id.* § 61 note, and §§ 445, 446.) Clubs and associations for social or charitable purposes are not partnerships. (*Id.* § 60.)

Colloquially a "Voluntary Association" may be any group of persons, whether incorporated or not, from the United States Steel Company to a boys' baseball club, or a women's sewing circle, united of their own volition; and one and all will have a right to issue "transferable certificates of participation or shares," without thereby affecting their legal status.

The "Ladies' Soldiers' and Sailors' Monument Association" (161 N. Y. 353), or a farmers' association to construct and operate a telephone line (122 N. Y. S. 610), or the "Washington Tent No. 1, Independent Order of Rechabites," associated for temperance, sympathy, and decent funeral obsequies (81 N. Y. 507), none of which were held to be partnerships, might any or all have been organized to use transferable shares, as well as the New England Gas and Coke Co. and the New England Investment and Security Co. (198 Mass. 413, 425, 430), the

latter two representing many millions of dollars of capital, and all of the above may be, as they are, referred to as "Voluntary Associations."*

We have corporations, joint-stock companies (common law and statutory†), partnerships, "trusts" (meaning combinations of corporations, a modern perversion or restriction of the term trust); and now that inapposite, sweeping, indefinite designation "Voluntary Association" has become the subject of a legislative inquiry in Massachusetts, which if it results only in helping to drive that expression into disuse, will be beneficial.

To attempt through legislation to synonymize or to put on a parity "Voluntary Associations," Partnerships, and Express Trusts created by private contract, and maintain that all three are like corporations created by the State, and to be regulated like corporations, merely because the common-law right of issuing shares is exercised by any one or all of them, is to invite contention. And to maintain that because *some* questionable "Voluntary Associations" have overstepped the mark, that, therefore, *all* Express Trusts, and Partnerships, and "good" "Voluntary Associations," shall, without distinguishing between public utilities and private enterprises, be "prohibited" or "controlled and regulated" by the State, is fallacious and prejudicial.

The confusion and the constitutional conflict such a course might incite recalls the swift disposition the writer made with the State authorities thirty years ago, in 1881,

*The definition given of "Voluntary Association" by the Tax Commissioner in his Report — House Document No. 1646, p. 2 — is as follows: —

"The term voluntary association as generally used signifies an association of persons with a combined capital, represented by transferable shares, for the purpose of carrying on a common project for gain."

But this attempt to narrow the term by so restricting its scope is arbitrary. It seeks to accentuate the features of transferable shares and of gain. But there are innumerable so-called "Voluntary Associations" without transferable shares, and very many with such shares carried on without trading with third persons for gain.

†See the leading case of *Spotswood* v. *Morris*, 12 Idaho, 360; 6 L. R. A. (N. S.) 665 (1906).

of the Act of 1878, Chap. 275, to tax "companies, co-partnerships and other associations, in which the beneficial interest is held in shares which are assignable," etc., which Act, not long after, received its judicial quietus as unconstitutional by the decision in *Gleason* v. *McKay*, 134 Mass., 419 (1883), reaffirmed and given a new application in *O'Keeffe* v. *Somerville*, 190 Mass., 110 (1906), and discussed in the Opinion of the Justices in 196 Mass., 603 (1908).

The supposition that transferable shares are a peculiar prerogative or special privilege or attribute of corporations, and that whoever uses them is to be disciplined as copying an essential of a corporate State charter, or as availing of an important characteristic of corporations, is a mistake. Transferable shares are not an essential, not even an attribute, not an inseparable or distinguishing mark of any corporation, but a mere incident or accessary of some corporations.

The corporations that represent the largest aggregate of capital, and whose total business now exceeds that of the Nation itself, issue no shares; these are municipal corporations. So, too, transferability of shares is not essential to chartered colleges, academies, hospitals, and other corporate institutions, founded by public endowment or private beneficence. Nor are such shares necessary in many scientific and literary societies for mutual benefit or charity, in the funds of which the members have a beneficial interest. On the other hand such a right of transfer may be incorporated into partnership articles or into testamentary or other express trusts, and become a fundamental condition of them, without altering their legal character, or trespassing upon any corporate attribute.

Legislatures and even Courts have occasionally fostered the above misconception; and Courts have had to correct themselves thereon. Mistaken ideas as to transferable

shares, as well as to other mere incidents of corporations, were analyzed and exposed over seventy years ago in New York in the leading case of *Warner* v. *Beers*, 23 Wendell Reports, pp. 103, 116, 130, 145 to 151, 174 to 176 (1840). Transferability of shares is recognized in Massachusetts as a natural right at common law. *Gleason* v. *McKay*, 134 Mass., 419, 425 (1883). Opinion of the Justices, 196 Mass. 603, 627 (1908).

It is to be hoped that here in Massachusetts no revival of the above-mentioned mistake will mislead either its Executive, Legislative, or Judicial Departments to believe that such an error can be justified either upon economic or upon legal grounds. Our free common-law rights in that respect rest on too broad and sound a footing to be curtailed by an assumption so narrow and mistaken. The acquisition of a formal charter of incorporation only *recognizes*, but does not *bestow*, these rights. (See "The Personality of the Corporation and the State," in 21 *Law Quarterly Review*, p. 365; at p. 370, Oct., 1905.) As for listing shares on Stock Exchanges, those Exchanges have their own rigid rules of acceptance or rejection which form a public safeguard.

The returns to the State required of corporations are not because a corporation issues transferable shares, but because the State is to keep information at hand of its own corporate creations, or, as Mr. Hall expresses it: —

"The present law, passed in 1903, adopts the modern view that the State owes no duty to investors to look after the solvency of corporations, and that its *sole obligation* is to see that creditors and stockholders shall be at all times informed as to the organization and management of the corporations to which *it gives franchises.*" (Mass. Business Corp. Hall, p. 3, 2d Ed.)

The present Legislative inquiry under Resolve 55, Acts of 1911, at the hands of the Tax Commissioner of the State, appears to be based on the mistaken ideas (1) that there is a corporate usurpation in all so-called "Voluntary Associations" whose beneficial interests are "divided

into transferable certificates of participation or shares"; and (2) that because the State feels bound to furnish information as to its impersonal — generally transitory — corporations to which *it gives franchises*, and to regulate those that are clothed with a *public* interest, therefore it must furnish similar information as to *private* persons to whom *it gives no franchises* and which they do not need, and must regulate private interests even when not clothed with a public character.

If such regulative or inquisitorial laws are to be valid they should be uniform (*Gleason* v. *McKay*, 134 Mass., 419, 425–6), applying to all without discrimination, and should include also all partnerships, for such may issue transferable shares representing millions of dollars. But Constitutional provisions that prohibit unreasonable interference with private rights cannot be ignored.

The proper appellation for Declarations of Trust that recognize common-law rights in matters of administration, and that restore the personal equation which State corporations evade, is "Express Trusts," the laws in regard to which are well established. No such Declaration of Trust should employ that all-inclusive, unfit term "Voluntary Association."

Trustees under Express Trusts are *not agents*, but principals, having the full title and control; and the beneficiaries thereunder are neither partners nor agents. This is elementary. If some authorities are wanted thereon the following are to the point: —

> ***Mayo*** **v.** ***Moritz*****, 151 Mass. 481, 484.**
> ***Mason*** **v.** ***Pomeroy*****, 151 Mass. 164; 7 L. R. A. 771.**
> ***Johnson*** **v.** ***Lewis*****, 6 Fed. Rep. 27, 28.**
> ***Taylor*** **v.** ***Davis*****, 110 U. S. 330, 334-5; 28 L. Ed. 163, 165.**
> ***Lackett*** **v.** ***Rumbaugh*****, 45 Fed. Rep. 23, 29.**
> ***Smith*** **v.** ***Anderson*****, L. R. 15, Ch. D., 247, 275-6, 284-5.**

The above ruling cases are readily distinguished from the familiar class that ascribe a partnership character to cer-

tain "joint-stock companies," "associations," and admitted to be "co-partnerships," of which *Taft* v. *Ward*, 106 Mass. 518, and *Phillips* v. *Blatchford*, 137 Mass., p. 510, are types.

The late Mr. J. Edward Simmons, President of the New York Chamber of Commerce, and for twenty-two years President of the Fourth National Bank in New York, in his address on Oct. 5, 1905, before the Maryland Bankers' Association, on "Honesty is the Best Policy," forcibly emphasized the basic principle involved herein. According to the New York *Daily Tribune* of Oct. 7, 1905, he

"laid his finger on the real trouble when he declared that the most demoralizing force in business today is the *divestiture of personal honor and personal responsibility* allowed by modern methods. The extension of the principle of incorporation has enabled leaders in business to set up two standards of morality, to maintain a Jekyll and Hyde duality, and to do as members of an *impersonal* and non-moral corporate body acts which they would shrink from as individuals." . . . "What is wanted, if we are to preserve rigid standards of honesty in business dealings, is adherence to the old notion of *personal responsibility* and personal integrity."

"Men (said Mr. Simmons), who pose as the salt of the earth and who condemn, without reserve, those who steal $50, or forge a check for $100, or accept a bribe, will themselves make millions by lying, by fraud and by bribery. In private life they are stainless, but in the interests of corporations, of the 'trusts,' of the gas company, of the railroad company, of the insurance company, they will have recourse to every villainy damned in the decalogue."

The Hon. Woodrow Wilson, in his address at Chattanooga, echoed the distinguished New York banker, Mr. Simmons; and it behooves Massachusetts, now advancing to restore that *personality* in administration which is the basis of liberty and of sound finance, not to embarrass that movement — which finds an efficient bulwark in Express Trusts — but to consider legislation that will implant more vitality at the inception of its impersonal corporate creations, and thus protect these artificial entities from premature oblivion.

Express Trusts. Corporations. "Voluntary Associations."

Second Paper, December 6, 1911.

The public hearings given under Resolve, Ch. 55, Acts of 1911, have emphasized some common errors: —

FIRST: That Corporations are supposed to *bestow* numerous privileges. Whereas for the most part they merely *recognize and adopt* certain natural common-law rights that are *not corporate* prerogatives or privileges.

SECOND: That Corporations present the highest model for organized capital. Whereas of the three standards of administration offered by (1) Corporations, (2) Partnerships, and (3) Express Trusts, that of Corporations is the lowest, while that of Express Trusts is the highest.

THIRD: That Express Trusts are Partnerships. Whereas the law of Partnerships is a branch of the law of Principal and Agent, while Trustees under an Express Trust are the absolute Principals, but accounting to the beneficiaries, who have no powers either as Principals or Agents in actual administration. This distinction is clear and indisputable.

FOURTH: That prohibitive, or repressive, or regulative legislation as to common-law modes of administration can be partlal or unequal. Whereas inequality in that respect creates a Constitutional conflict.

FIRST.

That Corporations are supposed to *bestow* numerous privileges. Whereas for the most part they merely *recognize and adopt* certain natural common-law rights that are *not corporate* prerogatives or privileges.

Corporations, as a rule, *bestow* nothing save the *artificial entity* that merges natural persons into an artificial being, with the right to sue and to be sued in a corporate name; and as the State creates these fictitious beings, it feels bound to regulate them in some degree.

Whatever else most corporations possess beyond their artificial entity and right of suit in their respective names, are mere "consequences or incidents of incorporation rather than primary constituents" (Wald's Pollock on Con., p. 126), such as issuing transferable shares, or limiting liability, or using a seal, or making by-laws, or purchasing lands and chattels, these being merely a recognition and adoption of natural common-law rights that any person or persons *sui juris* may exercise without a charter. (See *Warner* v. *Beers*, 23 Wendell, pp. 103, 116, 130, 145 to 151, 174 to 176. Wald's Pollock on Con., p. 296.)

"There are several very useful and beneficial *accessary* powers or attributes, very often accompanying corporate privileges, especially in moneyed corporations, which, in the existing state of our law, as modified by statutes, are more prominent in the public eye, and perhaps sometimes in the view of our courts and legislatures, than those which are *essential* to the being of a corporation. Such added powers, however valuable, are *merely accessary*. They do not in themselves alone confirm a corporate character, *and may be enjoyed by unincorporated individuals.* Such a power is the *transferability of shares*. . . . Such, too, is the *limited responsibility*. . . . So, too, the *convenience of holding real estate for the common purposes, exempt from the legal inconvenience of joint tenancy or tenancy in common.* Again: There is the *continuance of the joint property for the benefit and preservation of the common fund, indissoluble by the death or legal disability* of any partner. *Every one* of these attributes or powers, though commonly falling within our notions of a moneyed corporation, *is quite unessential to the legality of a corporation, may be found where there is no pretense of a body corporate; nor will they make one if all were combined, without the presence of the essential quality of legal individuality,"* etc., *per* Senator Verplanck, in *Warner* v. *Beers*, 23 Wend. 103, 145-6, *et. seq.*

The court in that case (pp. 149–155) refers to several *trusts*, and unincorporated associations, having the right to employ such accessaries, one of the more prominent being that of the Merchants' Bank, in the city of New York, with *limited liability*, as well as *transferable shares*, the articles of association for which were drawn by Alexander Hamilton. (Hamilton's Works, Congressional Ed., VII. 838.)

"The most peculiar and the strictly essential characteristic of a corporate body, which makes it to be such, and not some other thing in legal contemplation, is the merging of the individuals composing the aggregate body into *one distinct, artificial individual existence.* Now this is *not* found in the associations under the act." (*Id.* 23 Wend. p. 155.)

"By our *common law* as it would exist now, independently of statutory restrictions, associations might be formed and *trusts* created, *having every one of the above enumerated characteristics,* which have been insisted on as essential to a corporation, *except that personality forming its strict and necessary essential legal definition."* (*Id.* 23 Wend. pp. 152–3. See also 174–6.)

In the opinion of the Justices of the Supreme Judicial Court of Massachusetts given to the State Legislature, in 1908, on the taxation of transfers of stock, is the following: —

"None of these statutes implies that an excise tax may be laid upon a company, association, or partnership engaged in a simple business, like husbandry, merely because the members agree among themselves that their ownership shall be represented by *transferable certificates* of shares. Such an arrangement between two or more associates *is a simple contract which they have a right to make, and which gives them no franchise or privilege from the government.* Such an arrangement does not distinguish them in any way that the State can recognize and make the foundation of an excise tax. This was expressly decided in *Gleason* v. *McKay,* 134 Mass. 419." *Opinion of the Justices in* 196 Mass. 603, 627.

The above applies to the great generality of corporations. The right of eminent domain given to some public service companies and to municipal corporations, and certain rights as to transportation, banking, insurance, etc., are special privileges for which multitudes of corporations, partnerships, and express trusts have no need, and give as little cause, therefore, either for prohibition or for special legislative control.

SECOND.

That Corporations present the highest model for organized capital. Whereas of the three standards of administration offered by (1) Corporations, (2) Partnerships, and (3) Express Trusts, that of Corporations is the lowest, while that of Express Trusts is the highest.

The frauds for which abuse of State legislation creating artificial beings, called corporations, is responsible surpass all means of ascertaining. They have become a national scandal. It is the restoration of personal responsibility that statesmen, economists, and the wisest legislators are now demanding.

One of the oldest, and unquestionably the highest and most efficient administrative method known is that through Trustees. No higher standards of administrative conduct are evoked by Courts than those which trusts require. To attempt now to prohibit Express Trusts, or to bring them to the level of corporations or impair their established common-law freedom and utility by unnecessary visitorial exactions, is such a blunder, that its manifestation must be attributed to an oversight.

Not only are the principals of law and equity well established in their application to Express Trusts, but they have been successfully adopted for generations quite independently of modern corporations, and in Massachusetts they are applied to property valued at hundreds of millions of dollars, with increasing approval among as able and conservative business and professional men as are to be found in New England.

If there have been efforts by any State Department to discourage the application of these sound principles, and the maintenance of that *personality* in affairs which corporations are designedly organized to suppress, they are to be regretted.

The doctrine of reimbursement to trustees, and that of a limited liability between trustees and contracting parties, are as much in harmony with public policy, and are as fundamental and well established as any doctrines under which fiduciaries perform their duties, and in point of seniority outrank later day limited liability partnership statutes and limited liability corporation statutes, which public policy accepts, such statutes being a recognition of the common law. It may be safe to affirm that for a single instance of disappointment in the application of these doctrines there could be found thousands of instances where the wisdom of their recognition and employment is manifest.

To attempt now by general repressive legislation to interfere with what has been acquiesced in so long, is so well understood, is so useful, and so accordant with public policy, would be an economic error.

Our laws in regard to testamentary trusts under wills, and to conveyancing, are in daily force for the welfare of individuals and of the State; but who would subvert their confirmed principles because an occasional defective will or deed appears? Such casual slips can be rectified by themselves. The great current of legitimate procedure in the execution of Express Trusts should not be embarrassed because of some suspected transgression or misapprehended legal right.

THIRD.

That Express Trusts are Partnerships. Whereas the law of Partnerships is a branch of the law of Principal and Agent, while Trustees under an Express Trust are the absolute Principals, but accounting to the beneficiaries, who have no powers either as Principals or Agents in actual administration. This distinction is clear and indisputable.

Joint-stock companies, as known in England and in some of the United States,* are unknown to the laws of Massachusetts.

> *Ricker* v. *American Loan & Trust Co.*, 140 Mass. 346, 347-8.
> *Eliot* v. *Freeman*, 220 U. S. 178, 187.

Express Trusts, whether created under wills, deeds of settlement, assignments for the benefit of creditors, receiverships, or by special declarations of trust, to manage property or carry on business, are neither corporations nor joint-stock companies nor partnerships, but they employ a *distinct and the highest known method of administration.*

"Although every trust may be said to include a contract, *it includes so much more*, and the purposes for which the machinery of trusts is employed are of so different a kind, that *trusts are distinct in a marked way*, not merely from every other species of contract, but from all other contracts as a genus." Wald's Pollock on Contracts, p. 231.

Debts incurred under Express Trusts are not the debts of the beneficiaries under the trust, but are the *personal debts of the Trustees*, who are not agents, but are the absolute owners and principals. The Trustees have to account, of course, to the beneficiaries; but the beneficiaries have no partnership powers; and a strict Express Trust cannot be held as to its beneficiaries to be a partnership, with partnership powers and liabilities, without creating confusion and a mischievous subversion of established principles.

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*New York, New Jersey, Pennsylvania, Virginia, Ohio, and Michigan.

"The issue or transfer of a share in a *joint-stock company* makes the new shareholder *a partner*, and a party therefore to all contracts made by the company. In the case of *a trust*, the certificate holder is *not a partner* or a party to any contract of the trustees." Parsons on Partnership, § 449 (4th Ed.)

"To my mind the distinction between a director and a trustee is an *essential distinction founded on the very nature of things.* A *trustee* is a man who is *the owner* of the property, and deals with it *as principal*, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in the relation of trustee, and who are his *cestui qui trust.* . . . The office of *director* is that of a paid servant of the company. A director never enters into a contract for himself, but he enters into contracts for his principal, that is, for the company of whom he is a director and for whom he is acting. He cannot sue on such contracts nor be sued on them unless he exceeds his authority. That *seems to me to be the broad distinction between trustees and directors.*" *Per* James, L.J., in *Smith* v. *Anderson*, L. R. 15, Ch. D. 247, 275–6.

"*A trustee* is not an *agent.* An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined generally as a person in whom some estate, interest, or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. *When a trustee contracts as such unless he is bound no one is bound; for he has no principal.* The trust estate cannot promise; the contract is, therefore, the personal undertaking of the trustee. . . . *If a trustee, contracting for the benefit of a trust, wants to protect himself from individual liability on the contract, he must stipulate that he is not to be personally responsible, but that the other party is to look solely to the trust estate.*" *Per* Mr. Justice Woods in *Taylor* v. *Davis*, 110 U. S. 330, 334, 335; 28 L. Ed. 163, 165. *Lackett* v. *Rumbaugh*, 45 Fed. Rep. 23, 29.

"There is *no analogy* between an instrument which establishes *an agency* and one which creates *a trust.* Where an agency exists, the principal may at any moment interfere; and at all times he is, in legal contemplation, in control of the business. Not so when a party has parted with the title to his property, and has created a trust which vests in such trustee the right to manage the business as the proprietor thereof, he being accountable to the beneficiary, not as his principal, but as a mere *cestui que trust*, under the terms of the trust instrument." *Per* Corliss, Ch.J., in *Welles-Stone Mercantile Co.* v. *Grover*, 7 N. D. 460, 474; 41 L. R. A. 252, 257.

The literature upon this subject reveals that inattention, in this important matter, to the distinction in corporate powers between *bestowing* certain special rights and merely *recognizing and employing* certain natural common-law rights, has at times tended to a misapprehension, intensified by the

added mistake of regarding the relation between Trustee and beneficiary as identical with that between principal and agent.

But keeping the proper distinctions in view, the class of Massachusetts cases that have recognized as *partnerships* certain joint-stock companies, certain admitted to be associations and admitted to be copartnerships (such as *Phillips* v. *Blatchford*, 137 Mass. 510), are readily distinguished from strict Express Trusts.

That Express Trusts are not necessarily partnerships was unanimously decided by our Supreme Judicial Court, through Mr. Justice Charles Allen, in *Mayo* v. *Moritz*, 151 Mass. 481, 484, when he wrote that: —

"*The deed of trust does not have the effect to make the scrip-holders partners.* It does not contemplate the carrying on of a partnership business upon the joint account of the grantor and the scrip-holders, and in this respect the case is unlike *Gleason* v. *McKay*, 134 Mass. 419, and *Phillips* v. *Blatchford*, 137 Mass. 510. The scrip-holders are *cestui qui trust*, and are entitled to their share of the avails of the property when the same is sold."

See also:—

Mason v. *Pomeroy*, 151 Mass. 164. (Mills in Berkshire County, Massachusetts, managed by trustees.)
Everett v. *Drew*, 129 Mass. 150, 151.
Johnson v. *Lewis*, 6 Fed. Rep. 27, 28.
Smith v. *Anderson*, L. R. 15 Ch. D. 247, 275–6, 284–5.
Cox v. *Hickman*, 9 C. B. N. S. 47, 98–9; 8 H. of L. Cases, 268, 312.
Wells-Stone Mercantile Co. v. *Grover*, 7 N. D. 460; 41 L. R. A. 252.

In the case of the "Municipal Trust" of London, with a capital of £350,000, for the purpose of purchasing bonds of municipalities within the United States, and which came before the U. S. Circuit Court, it was held that: —

"*The trust was not a corporation or joint-stock company or partnership, but a trust* formed by deed of settlement for the purpose of securing investments. The Trustees were the legal owners of the trust property, and the business of the trust was managed by them and "the Committee" created by the deed for the benefit of the certificate holders, who were

strangers to each other, and who entered into no contract between themselves, nor with any trustee on behalf of each other, *and were not, therefore, partners.*" *Per* Caldwell, D.J., In *Johnson* v. *Lewis et al.*, 6 Fed. Rep. 27, 28.

So when assignments for the benefit of creditors are made, or a receiver is appointed, or the National Bankrupt Act is applied, putting the debtor's property into the exclusive control of assignees or trustees, who may conduct the business (Bankr. Act, 1898, 2 (5); Mass. Rev. Laws, Ch. 163, Sec. 64; Acts of 1910, Ch. 141), the beneficiaries or creditors do not become partners. Nor does a trustee's exercise of the common-law right to issue certificates of beneficial interest alter the legal status of the parties, or borrow any corporate privilege.

A leading case on this is found in *Welles–Stone Mercantile Co.* v. *Grover*, 7 North Dakota, 460; 41 L. R. A. 252, wherein two Massachusetts cases (*Gleason* v. *Mc Kay*, 134 Mass. 419, and *Phillips* v. *Blatchford*, 137 Mass. 510) were cited by the losing party to maintain that beneficiaries under a trust were partners, but the Court through Chief Justice Corliss, in a strong, comprehensive opinion, determined that the relation created by the instrument of assignment which authorized the operation and management of the business, was that of *trustee and beneficiary* and *not* that of *principal and agent*, and hence that the beneficiaries were *not partners*. The Chief Justice relied, among many others, upon the Massachusetts cases of *Mayo* v. *Moritz*, 151 Mass. 481, and *Mason* v. *Pomeroy*, 151 Mass. 164. Strong reliance was also placed by the Court on the leading English case of *Cox* v. *Hickman*, 9 C. B. N. S. 47; 8 H. of L. Cases, 268; where after various appeals the law lords (Lord Chancellor Campbell and Lords Brougham, Cranworth, Wensleydale, and Chelmsford) were unanimous that no partnership arose in the case of property placed in the hands of Trustees to manage for beneficiaries.

While the law as to Trustees and beneficiaries is *not* a branch of the law of *principal and agent*, yet *just the reverse* is the case *as to partnerships*, for

"The law as to *Partnerships* is undoubtedly a branch of the law of *principal and agent;* and it would tend to simplify and make more easy of solution the questions which arise on this subject, if this true principle were more constantly kept in view. Mr. Justice Story lays it down in the 1st section of his work on Partnership. He says, *'every partner is an agent* of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of principal and agent,' *per* Lord Wensleydale, in

Cox v. *Hickman*, 9 C. B. N. S. 47, 98–9; 8 H. of L. Cases, 268, 312.
This case in now generally adopted in the United States.
George on Partnership, 37, 43.

"True partnership results from the *intention* of the parties."
Gilmore on Partn., p. 10 (1911).

"The rule which made the sharing of profits a test of partnerships rather than a test of intention to form a partnership was overthrown in England, and was never generally accepted in the United States."
Gilmore on Partn., p. 19.

"A true partnership is always formed *by virtue of a contract* between all the parties, and *never by operation of law.*"
Shumaker's Law of Partn., p. 4.

"Under the modern doctrine of partnership, persons are not liable to third persons as partners, although they share profits, unless
(a) They are really partners *inter se* or
(b) Have held themselves out as partners under such circumstances as to estop them from denying it."
Shumaker's Law of Partn., p. 16.

"The *intention* of the parties, as gathered from a construction of the contract they have made, is the real test of the existence of a partnership."
Shumaker's Law of Partn., p. 21.

See also the elaborate foot note to *Miller* v. *Simpson*, 107 Va. 476, in 18 L. R. A. (N. S.) 963 to 1106, and especially article XIII therein, on "The passing of the old and advent of the new test of partnership," p. 1066 *et seq.;* also article XIV therein on "The agency test," p. 1072; and article XXVI, the "Conclusion," p. 1105.

Partners, therefore, are both principals and agents, as manifested by the intention of the parties under their contract. Beneficiaries under strict Express Trusts cannot be

partners, because they can be neither principals nor agents, the Trustees being the *absolute principals*, but bound to account to the beneficiaries as *cestui que trustent.*

Everett v. *Drew*, 129 Mass. 150, 151.
Mayo v. *Moritz*, 151 Mass. 481, 484.

That individuals, or executors and administrators, or assignees and receivers, or partners under articles of co-partnership or under statutes as to limited partnerships, and *a fortiori* trustees under a will or under a deed of settlement or under an express trust, may lawfully limit their liability, accords with established doctrines of restriction by agreement or of stipulations limiting liability.

Taylor v. *Davis*, 110 U. S. 330, 334-5, 28 L. Ed. 163, 165.
Am. & Eng. Encyc. Laws 22, pp. 142, 173.

Executors and administrators "are regarded in almost every respect, in courts of equity, *as trustees*" (Woerner on Administration, pp. 10, 798, 1117); their title, however, in the estate of the deceased is in *autre droit* merely (*id.* p. 386; 207 Mass. 6, 10); but the title held by Trustees under an Express Trust is absolute in the Trustees.

It is incorrect to say that because stockholders in corporations are accorded certain exemptions from liability, that therefore trustees, partners, and others who employ the common-law right of limiting liability, are imitating corporations, or arrogating some of their privileges, for it is the corporations that are allowed to imitate or to recognize and employ just what individuals and trustees and partners have a natural common-law right to do, and have been doing for an indefinite period, without borrowing any later day corporate incident.

In substantiation of the right of Trustees to limit their liability by contract under the common law, the following authorities are conclusive: —

"A trustee can be held personally for material ordered by him for the trust estate, and on contracts made by him in its behalf, *unless there be a special agreement to look only to the trust.*"

I. Perry on Trusts, § 437a and cases.

"By using appropriate expressions the trustee can exempt himself altogether from personal liability or limit his liability *to the extent of the trust.*"

Trustees' Handbook, Loring, pp. 28, 77, 78, and cases. (3d Ed. 1907.)

"The legal estate is in the trustee, and the equitable estate is in the *cestui que trust;* but as the trustee *holds the estate,* although only with the power and for the purpose of managing it, he is bound personally by the contracts he makes as trustee, although designating himself as such; and nothing will discharge him *but an express provision, showing clearly that both parties agreed to act upon the responsibility of the funds alone, or of some other responsibility, exclusive of that of the trustee.*"

I. Parsons on Contracts, p. 122. (8th Ed.)
II. Page on Contracts, § 990, and many cases.

"The right of making a contract, whereby those who tender it stipulate not to be bound beyond the amount of some specific pledged fund, *must be a natural right growing out of the very nature of contracts.*" *Per* Verplanck, Senator, in *Warner* v. *Beers,* 23 Wendell, 103, 151.

"In dealing with the business world, a trustee cannot escape personal liability *unless he lawfully restricts his liability in the contract itself.*" . . . *Of course, the parties may agree that the trustee shall not be held personally on the contract, but that only the trust estate itself shall be chargeable with the debt. In such a case . . . the trustee is not bound, but the fund is.*" *Per* Corliss, Ch.J., in *Wells-Stone Mercantile Co.* v. *Grover,* 7 N. D. 460, 463, 464; 41 L. R. A. 252, 253, 254.

Bank of Topeka v. *Eaton,* 100 Fed. Rep. 8 (C. C.–Mass.–1900.)

Chief Justice Knowlton in his opinion in *Hussey* v. *Arnold,* 185 Mass. 202, 204, says: —

"Whether the trustees in this case, in dealing with the petitioner, *provided against personal liability in accordance with the direction in the agreement, as they might do* (see *Shoe & Leather Nat. Bk.* v. *Dix,* 123 Mass. 148), does not appear." . . . "If the trustees contracted in the usual way *without referring to anything which would limit the liability resulting from an ordinary contract,* they are personally liable," etc.

Later in this opinion the Chief Justice, however, interjects a dictum as to

"considerations of public policy in an attempt of this kind to do business *without a legal liability of anybody* for debts incurred by the trustees."

But the Chief Justice appears to disparage (1) his previous recognition of the common-law right to limit liability to the fund or property; (2) the declaratory incorporation

of that common-law principle in limited partnership and in corporation acts; and (3) the everyday successful administration entirely in accord with public policy, under this trustee system, and under common-law rights, of property valued at hundreds of millions of dollars. Also (4) the Chief Justice's reference to the trustees, "As *agents* and trustees" (p. 204), appears to overlook the doctrine that trustees are not agents, but principals; and (5) he appears to slight the equitable relief attainable against the *estate* held by the trustees, and the settled doctrine of equitable execution upon the trustees' right of exoneration, as determined in the case of *Mason* v. *Pomeroy*, 151 Mass. 164, 167, recognized also in *Mayo* v. *Moritz*, 151 Mass. 481, 484–5, in *Odd Fellows Hall Association* v. *McAllister*, 153 Mass. 292, 297, and in *Broadway Nat. Bk.* v. *Wood*, 165 Mass. 312, 316 See also: —

Hewitt v. *Phelps*, **105 U. S. 393, 400; 26 L. Ed. 1072.**
Story's Eq. II. § 978 n. (c) and cases.
Wells-Stone Mercantile Co. v. *Grover*, **7 N. D. 460; 41 L. R. A. 252, and cases cited.**
Brown v. *Eastern Slate Co.*, **134 Mass. 590.**
Norton v. *Phelps*, **54 Miss. 467, S. C. Ames' Cases on Trusts, 420 (2d Ed.), and cases cited.**
"Liability of Trust Estates for Contracts Made for Their Benefit." 15 *Am. Law Rev.* 449–462.
"Undisclosed Principal." By James Barr Ames, in *Yale Law Journal*, May, 1909, pp. 450, 451.
Bank of Topeka v. *Eaton*, **100 Fed. Rep. 8 (C.C.–Mass.–1900).**
Parsons on Partnership, § 447, and cases (4th Ed.).
Underhill on Trusts & Trustees, §§ 347, 348 (6th Eng. Ed.).

FOURTH.

That prohibitive or repressive or regulative legislation as to common-law modes of administration can be partial or unequal. Whereas inequality in that respect creates a Constitutional conflict.

Prohibitive, repressive, or regulating laws should be uniform; and if any attempt is made to select Trustees who issue transferable certificates under Express Trusts and to omit Trustees who do not issue such certificates, or to select partners who issue transferable shares and to omit partners who do not issue such shares, or to select Trustees and to omit partners, the Constitutional point of inequality is likely to arise, as in *Gleason* v. *McKay*, 134 Mass. 419, 425–6, which case set aside as unconstitutional the Act of 1878, Chap. 275, to tax "companies, copartnerships, and other associations, in which the beneficial interest is held in shares, which are assignable," etc.; for as Chief Justice Field said, in *Minot* v. *Winthrop*, 162 Mass. 113, 122, and quoted with approval by Chief Justice Knowlton and others in the opinion of the Justices in 196 Mass. 603, 628: —

"As the tax considered in *Gleason* v. *McKay* was not upon a business or employment, and as there was no franchise or privilege conferred by the Legislature, *the distinction between partnerships with transferable shares and those without rendered the tax unequal and unreasonable, because it was a discrimination founded upon an immaterial fact.*"

"Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, and would be such an arbitrary mandate as is not within the province of free governments." . . . "Equality of rights, privileges, and capacities unquestionably should be the aim of the law." . . . "The State, it is to be presumed, has no favors to bestow, and designs to inflict no arbitrary deprivation of rights." (Cooley's Const. Limitations, pp. 559, 562, 563, 7th Ed.)

The stampede to organize under corporation laws, and thus try in many cases to obtain something for nothing, by evading personal responsibility, has been perverted into a national disgrace, as the Hon. Woodrow Wilson so forceably presented to the legal profession in his address at Chattanooga in 1910.

It is the duty of that profession and of the Legislature, if any legislation is really necessary upon this score, rather to confirm the common-law natural right of all persons *sui juris* to manage affairs, whether as individuals, or as partners, or as assignees, or trustees under Express Trusts, as they now do, than to encourage the use of evasive corporate charters. In the great majority of cases administration through Express Trusts is superior to that of any other method.

Mortality in Massachusetts for human beings has averaged during the past five years about sixteen (16) per cent for every 1,000 persons. Mortality for corporate beings with Massachusetts' imprimatur has averaged for the same period about sixty-four (64) per cent.

Express Trusts are constitutionally far more healthy.

Corporate *impersonality* in administration invites both fraud and disaster. Trust *personality* is the strongest safeguard against them.